KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 8, 2022

Mr. Andrew Wipke
Assistant County Attorney
Fort Bend County
401 Jackson Street, 3rd Floor
Richmond, Texas 77469

OR2022-16472

Dear Mr. Wipke:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 952303 (County Attorney ID# 0487).

Fort Bend County (the "county") received a request for eleven categories of election records pertaining to a specified election.[1] You state the county does not have information pertaining to portions of the request.[2] You also state the county has released some of the requested information. You claim some of the requested information is not subject to the Act. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. In addition, the county states release of some of the submitted information may implicate the proprietary interests of Election Systems & Software, LLC ("ES&S"). Accordingly, the county states, and provides documentation showing, it notified ES&S of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory

[1] We note the county asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

[2] We note the Act does not require a governmental body to disclose information that did not exist at the time the governmental body received the request for information. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from ES&S. We have considered the submitted arguments and reviewed the submitted representative sample of information.[3] We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the county asserts some of the requested information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code. Section 552.002 provides, in pertinent part, the following:

> (a) In this chapter, "public information" means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body;
>
> (2) for a governmental body and the governmental body:
>
> (A) owns the information;
>
> (B) has a right of access to the information; or
>
> (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
>
> (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. The county states the requested election software is "merely a tool for the maintenance, manipulation, or protection of public property." Based on this representation and our review, we find the requested election software does not constitute public information under section 552.002 of the Government Code and need not be released in response to this request.[4]

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[3] We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[4] As we are able to make this determination, we need not address the remaining arguments against disclosure of this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 66.058 of the Election Code, which provides, in relevant part:

> (a) Except as otherwise provided by this code, the precinct election records shall be preserved by the authority to whom they are distributed for at least 22 months after election day.
>
> (b) For a period of at least 60 days after the date of the election, the voted ballots shall be preserved securely in a locked room in the locked ballot box in which they are delivered to the general custodian of election records.
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> . . .
>
> (b-1) Except as permitted by this code, a ballot box or other secure container containing voted ballots may not be opened during the preservation period.
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> . . .
>
> (g) Electronic records created under Chapter 129 shall be preserved in a secure container.

Elec. Code § 66.058(a)-(b-1), (g). "Precinct election records" means the precinct election returns, voted ballots, and other records of an election that are assembled and distributed under chapter 66 of the Election Code. *See id.* § 66.02; *see also id.* §§ 121.001 (noting other provisions of this code apply to an election in which a voting system is used), 127.132 (explaining voted ballots, election returns, and other election records of an electronic voting system shall be delivered to the authorities who receive corresponding records from precinct polling places using regular paper ballots), 129.001 (stating chapter 129 applies to voting system that uses direct recording electronic voting machines and, to the extent possible, procedures applicable to electronic voting system under chapter 127 are applicable to voting system under chapter 129). You assert the information at issue constitutes precinct election records made confidential by section 66.058. Based upon your representation, we agree the information at issue is subject to section 66.058.

The Election Code authorizes access to election records during the preservation period for several purposes, including, for example, recounts, election contests, criminal investigations, and counts conducted pursuant to chapter 127 of the Election Code. *See* Open Records Decision No. 505 at 2 n.2 (1988). You state, and we agree, there is no indication the Election Code authorizes access to the information at issue in this case. Thus, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the county must withhold the remaining information under section 552.101 of the Government

Code on that basis for the duration of the preservation period.[5] After this period, the information at issue is subject to public disclosure. *See* ORD 505 at 4 (request made during preservation period to inspect voted ballots must be treated as request to inspect ballots when retention period expires).

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

D. Michelle Case
Assistant Attorney General
Open Records Division

DMH/be

Ref: ID# 952303

c: Requestor

[5] As our ruling is dispositive, we need not address the remaining argument against disclosure of the submitted information.